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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN LUIS ALONSO BENITEZ,

Defendant and Appellant.

G052520

(Super. Ct. No. 13NF0991)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Cheri T. Pham, Judge. Affirmed.

Richard Jay Moller, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and
Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Juan Luis Alonso Benitez was convicted of aggravated assault, which is a wobbler offense that can be punished as a felony or as a misdemeanor. Defendant's request to reduce the felony to a misdemeanor was denied by the trial court.

We affirm. Defendant has failed to establish that the court abused its discretion in denying the request. Granting a separate request to strike a prior violent and serious conviction for sentencing purposes did not require that the court also grant the request to reduce the felony to a misdemeanor.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In March 2013, defendant and his friend, Jose Cerpas, were involved in a fight with three other men outside a bar in Fullerton. While one of the other men, Jesus A., was lying on the ground, defendant kicked him in the head. Defendant and Cerpas repeatedly punched one of the other men, who was trying to stop the attack on Jesus A. Defendant continued to attack Jesus A.

A jury found defendant guilty of assault with force likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(4)). In a bifurcated proceeding, the trial court found true that defendant had suffered a prior serious and violent felony conviction. (Pen. Code, §§ 667, subds. (d) & (e)(1), 1170.12, subds. (b) & (c)(1).)

In his sentencing brief, defendant requested the trial court to reduce his felony conviction to a misdemeanor (Pen. Code, § 17, subd. (b)), and to strike his prior serious and violent felony conviction (Pen. Code, § 1385). The People opposed defendant's requests. The court denied the request to reduce the felony to a misdemeanor. However, the court granted the request to strike the prior conviction for sentencing purposes, placed defendant on three years' formal probation, and sentenced him to 364 days in jail.

DISCUSSION

A violation of Penal Code section 245 is a wobbler offense, which may be punished either as a felony or a misdemeanor. Defendant asked the trial court to reduce his felony to a misdemeanor pursuant to Penal Code section 17, subdivision (b), which provides, in relevant part: “When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: [¶] . . . [¶] (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.”

The decision to reduce a wobbler offense from a felony to a misdemeanor rests “solely ‘in the discretion of the court.’” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977 (*Alvarez*).) “‘The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.’ [Citation.] Concomitantly, ‘[a] decision will not be reversed merely because reasonable people might disagree. “An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.” [Citations.]’ [Citation.]” (*Id.* at pp. 977-978.)

The *Alvarez* court noted that in exercising its discretion, the trial court should consider “‘the nature and circumstances of the offense, the defendant’s appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.’ [Citations.] When appropriate, judges should also consider the general objectives of sentencing such as those set forth in California Rules of Court, [former] rule 410.” (*Alvarez, supra*, 14 Cal.4th at p. 978.)

In denying defendant's request under Penal Code section 17, subdivision (b), the court set forth its analysis of the required factors under *Alvarez*:

"First, the nature and circumstances of the offense. The court makes the following finding: While the case may be characterized as a bar fight wherein multiple people in various states of inebriation were involved, the fact remains is that the acts for which the defendant is convicted was kicking the victim in the head while the victim was on the ground unable to defend himself. This was an act of violence that could have resulted in very serious injuries to the victim.

"The second factor is the defendant's appreciation of and attitude toward the offense. The court will note the court has reviewed the probation sentencing report in this matter, and based on his statements, the court finds that the defendant is willing to make restitution to the victim, but he still maintains that he acted in self-defense.

"As far as the third factor, which is the general objectives of sentencing, which include protecting society, punishment, deterrence, crime prevention, restitution, and uniformity in sentencing, as well as reintegration of the defendant into society, the court has considered these objectives and finds that the interests of protecting society, punishment, deterrence, and crime prevention would not be served by reducing the charge to a misdemeanor. It would send the wrong message that the defendant's acts in this case are not serious and unacceptable."

The trial court explicitly set forth its reasons for denying the request to reduce the felony to a misdemeanor. The court fully considered each of the factors identified by the *Alvarez* court. The denial of defendant's request was neither irrational nor arbitrary. Indeed, defendant does not seriously argue it was.

Rather, defendant argues that because the trial court granted his request to strike his prior conviction for sentencing purposes, the court should have reduced the felony to a misdemeanor for similar reasons.

In exercising its discretion to strike the prior felony conviction for sentencing purposes, the court set forth its reasoning: “First, while the defendant’s act of kicking the victim in the head is a violent act—and this in no way condones your action that day—the crime for which the defendant was found guilty . . . is not technically a violent or serious felony [¶] Second, in the current case, the defendant is statutorily ineligible for probation and but for that ineligibility would have been granted probation. [¶] Third, the strike prior allegation was a juvenile adjudication which occurred when the defendant was 17 years old. . . . [T]he prior is now over six years old as of today’s date. [¶] And other than that prior juvenile strike and one other juvenile prior on the same date, . . . the defendant has no other criminal record as either a juvenile or adult. [¶] . . . [¶] . . . Fourth, the court has considered the defendant’s age, social history, character, and prospects [¶] . . . [¶] The fifth factor the court has considered . . . is the general objectives of sentencing as set out in rule of court 4.410 [¶] The court finds that it would not serve the interests of justice by imposing a state prison sentence on this defendant who, but for this offense, had seemed to turn his life around.”

The trial court also made the following findings regarding the criteria set forth in California Rules of Court, rule 4.414: Defendant was not armed and did not use a weapon; he had no criminal record other than the juvenile adjudications; he successfully completed his juvenile probation; he had the ability to comply with reasonable terms of probation; significant imprisonment would have a detrimental effect on defendant; and there would be adverse future collateral consequences due to his felony conviction. The court therefore found that there was a likelihood that defendant would succeed upon a grant of probation.

While the trial court’s rulings on the two discretionary decisions relied on some of the same factors, there was not a complete overlap. The court explained its exercise of discretion on the record and relied on the correct factors in both analyses. Defendant provides no authority that if relief is granted under Penal Code 1385, it

necessarily follows that relief must be granted under Penal Code section 17, subdivision (b). No abuse of discretion has been shown in either of the court's rulings. Therefore, the court's conclusion as to section 1385 did not require the same conclusion as to section 17.

Further, the court noted it was "taking a chance" on defendant by placing him on probation. Striking defendant's prior conviction for purposes of sentencing would allow the court to impose a state prison sentence on defendant if he were to fail to comply with the terms of his probation; had the court granted defendant's request pursuant to Penal Code section 17, subdivision (b)(3), the threat of later imprisonment would not have been available to the court.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.